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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CASE NO. PD-0561-18

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

LISANDRO BELTRAN DE LA TORRE,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

On Petition for Discretionary Review from
The First Court of Appeals
In No. 01-17-00218-CR Affirming the
Judgment of Conviction in Cause No. CR-16-082 from the
25th Judicial District Court of
Colorado County, Texas

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the following is a list of all parties to the trial court's judgment as well as the names and addresses of trial and appellate counsel.

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The Honorable William D. Old III
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Appellant
Lisandro Beltran De La Torre

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

Appellant was charged by indictment in Cause No. CR-16-082 with possession of a controlled substance. (CR 10).[1] Following his plea of "not guilty," the case proceeded to trial before a jury. On February 22, 2017 Appellant was found guilty of possession of a controlled substance as charged in the indictment. (3RR 70)(CR 54). On March 27, 2017, the court assessed punishment at two (2) years in the Texas Department of Criminal Justice – State Jail Division, probated for three (3) years. (CR 57). On March 27, 2017, Appellant timely gave written notice of appeal. (CR 3).

The judgment of the trial court was affirmed by the First Court of Appeals in a published Opinion delivered March 15, 2018. *De La Torre v. State*, No. 01-17-00218-CR, 546 S.W.3d. 420 (Tex. App.–Houston [1st Dist.] March 15, 2018, *pet. granted*). Appellant's motion for rehearing was denied on May 8, 2018.

[1] "CR" will be used to reference the Clerk's record, and "RR" will be used to reference the Reporter's Record.

On July 3, 2018, Appellant petitioned the Texas Court of Criminal Appeals for discretionary review regarding Issues Number Two and Three in his brief. On October 3, 2018, the Texas Court of Criminal Appeals granted Appellant's petition.

STATEMENT REGARDING ORAL ARGUMENT

This Court did not grant Appellant's request for oral argument.

GROUNDS FOR REVIEW

1. The Court Of Appeals Erred In Holding The Trial Court Did Not Improperly Comment On The Evidence By Providing A Jury Instruction On "Joint Possession" That Added To The Statutory Definition Of "Possession"

2. The Court Of Appeals Erred In Alternatively Holding It Was Not Error To Refuse Appellant's Requested Jury Instruction On "Mere Presence" While Holding The Jury Instruction On "Joint Possession" Was Appropriate

STATEMENT OF FACTS

On February 12, 2016, Jose Lara was employed as a police officer with the Columbus Police Department. (2RR 155). On that date Lara proceeded to the Texas DPS Office in Columbus after hearing that another officer was dispatched to that location. (2RR 159). Lara approached and parked next to the vehicle described in the dispatch. (2RR 160).

Contact was made with the driver, who was later identified as Lisandro Beltran De La Torre ("Appellant"). (2RR 164). Lara made contact with a female in the front passenger seat and another female in the right rear passenger seat. (2RR 161). Upon approaching the vehicle, Lara observed in plain view a little baggie containing what he believed to be a controlled substance. (2RR 161). The three occupants were removed from the vehicle and detained. (2RR 161-62). Lara observed a fourth subject near the vehicle, but after his initial detention he left the scene. (2RR 162).

Lara photographed the little package he observed, and performed a field test on the substance which tested positive for cocaine. (2RR 165-66). A further search of the vehicle did not reveal any contraband. (2RR

166-67). Lara also determined that the vehicle was registered to Appellant. (2RR 172).

Columbus Police Officer Anthony Axel was also dispatched to the Columbus DPS office on February 12, 2016. (2RR 189-191). Along with Officer Lara, Axel approached the subject vehicle, a black BMW. (2RR 191-92). Appellant was identified by Axel as the individual in the driver's seat of the vehicle. (2RR 192). Axel walked Appellant to the rear of the BMW, placed him in handcuffs, and seated him on the ground. (2RR 193). While walking to the front of the vehicle, Axel observed some beer cans in the back seat and a small baggie on the console. (2RR 194).

Axel entered the front passenger area of the vehicle and retrieved the baggie. (2RR195-196). Axel conducted a field test on the contents which was positive for cocaine. (2RR 196). Axel also observed Appellant to have dilated and glassy eyes. (2RR 196). Based on his training, Axel stated that dilated pupils can be caused by ingestion of cocaine. (2RR 197).

Axel was fitted with a body camera which was activated when he exited his vehicle. (2RR 202-203). Upon reviewing the video, Axel acknowledged there was another male present at the scene who was

instructed to have a seat on the ground. (3RR 11-13). This individual subsequently stood up and walked away while Axel was detaining Appellant. (3RR 14). Appellant made no admission showing knowledge of the baggie at the time of arrest. (2RR 208).

Henry Amen was employed in the crime lab of the Texas Department of Public Safety. (2RR 23). Amen determined that the baggie, State's Exhibit 9, contained .02 grams of cocaine. (2RR 229, 231).

In his defense, Appellant testified that his vehicle was occupied by four people, including himself, when the police approached. (3RR 21). Yanet was seated next to him in the passenger seat, and Dallen and Leo were in the backseat. (3RR 21-22). Appellant denied knowing the baggie was in his vehicle. (3RR 23).

SUMMARY OF THE ARGUMENT

Appellant's defense was that he had no knowledge of the controlled substance and was merely present in the vehicle where the baggie was found. Furthermore, the evidence showed there were three (3) other persons present, one of whom left the scene after initially being detained. The State argued that sufficient evidence existed to prove Appellant

knowingly possessed the controlled substance despite the presence of others at the scene.

The court's charge contained an instruction that expanded that statutory definition of "possession" to include the following language:

> Two or more people can poses the same controlled substance at the same time

(CR 51).

In exceeding the statutory definition the additional instruction was not "applicable law" under Article 36.14, *infra*. Furthermore, the additional instruction singled out the state's evidence and theory of prosecution, therefore, it was an improper comment on the evidence.

Despite inclusion of the additional instruction, Appellant's request for a jury instruction on "mere presence" was denied. The absence of an instruction on "mere presence" deprived the jury of a correct statement of the law and, thus served to mislead and confuse the jury. Appellant was denied a fair trial because the jury charge error singled out a fact in dispute that supported the State's theory of prosecution, but undermined Appellant's defense that his mere presence did not prove knowing possession.

FIRST GROUND FOR REVIEW (RESTATED)

The Court Of Appeals Erred In Holding The Trial Court Did Not Improperly Comment On The Evidence By Providing A Jury Instruction On "Joint Possession" That Added To The Statutory Definition Of "Possession"

SECOND GROUND FOR REVIEW (RESTATED)

The Court Of Appeals Erred In Alternatively Holding It Was Not Error To Refuse Appellant's Requested Jury Instruction On "Mere Presence" While Holding The Jury Instruction On "Joint Possession" Was Appropriate

ARGUMENT

A. Factual Background

Appellant's trial strategy was to show he was merely present and therefore did not knowingly exercise actual care, custody, control, or management over the controlled substance. Appellant testified that he had no knowledge of the cocaine or the baggie recovered from the vehicle. (3RR 23). Furthermore, Appellant testified that there were three other occupants in the vehicle. (3RR 21). One of the occupants was a male identified as Leo. (3RR 21-22). The police body camera showed an initial

detention of another male, but he was allowed to leave the scene.[2] (3RR 12-14). Appellant's defense was that he did not knowingly exercise care, custody and control over the cocaine and was only present in the vehicle.

The trial court instructed the jury on the definition of "possession" in accordance with Tex. Health & Safety Code Ann. § 481.002(38). (CR 51). The trial court exceeded the statutory language by further instructing the jury:

> Two or more people can possess the same controlled substance at the same time.

(CR 51).

Appellant requested that the trial court provide a jury instruction on "mere presence." (3RR 29-30). The trial court denied the request. (3RR 30).

B. Applicable Law on Jury Instructions

Texas Code of Criminal Procedure Article 36.14 directs the trial judge to "deliver to the jury … a written charge distinctly setting forth the law applicable to the criminal offense that is set out in the indictment

[2] The evidence suggests that this male was the other person in the vehicle who Appellant identified as Leo.

or information…." *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). *See also* Tex. Code Crim. Proc. art 36.14.

On the other hand, the trial judge is prohibited from commenting on the evidence in the jury charge. *See* art. 36.14, *supra*. The judge must deliver a charge

> Not expressing any opinions as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury.

Id.

C. The Instruction On Joint Possession Was Not "Applicable Law" As It Exceeded The Definition Of The Elements Of The Criminal Offense Set Out In The Indictment.

As a general matter, definitions for terms that are not statutorily defined are not considered to be the "applicable law" under Article 36.14, thus it is generally impermissible for the trial court to define those terms in the jury instructions. *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015); *see also Kirsch v. State*, 357 S.W. 3d 645, 651 (Tex. Crim. App. 2012); *Celis v. State*, 416 S.W.3d 419, 433 (Tex. Crim. App. 2013) (plurality op.)("Non-statutory instructions, even when they are neutral and relate to statutory offenses or defenses, generally have no place in

the charge.") *Walters v. State*, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007) ("Normally, if the instruction is not derived from the code, it is not 'applicable law'").

The Texas Health and Safety Code defines "possession" as actual care, custody, control or management." TEX. HEALTH & SAFETY CODE §481.002 (38). It is undisputed that the statutory definition of "possession" contains no language addressing "joint possession" and certainly not the language: "[t]wo or more people can possess the same controlled substance at the same time." "Joint possession" was neither an element of the offense nor was it alleged in the indictment. Accordingly, the instruction was not "applicable law" for purposes of instructing the jury under Article 36.14. *See Kirsch v. State*, 357 S.W.3d at 651.

D. The Instruction On Joint Possession Was A Comment On The Evidence

In the Texas adversarial system, the judge is a neutral arbiter between the advocates; he is the instructor in the law to the jury, but he is not involved in the fray. *See Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003); *see also Lagrone v. State*, 84 Tex. Crim. App. 609, 615,

209 S.W. 411, 415 (1919) ("[t]he law contemplates that the trial judge shall maintain an attitude of neutrality throughout the trial").

Article 36.14 is a reflection of that devotion to a strict division of duties. An instruction "by the trial judge to the jury on the weight of the evidence reduces the State's burden proving guilt beyond a reasonable doubt to the jury's satisfaction." *Brown v. State*, 122 S.W.3d at 798. In Texas, a trial judge must also refrain from making any remark calculated to convey to the jury his opinion of the case. As we have explained: "[j]urors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved." *See id.*

An instruction, albeit facially neutral and legally accurate, may nevertheless constitute an improper comment on the weight of the evidence. *See, e.g., Brown v. State*, 122 S.W.3d at 797. It is also an improper judicial comment to provide an instruction on "vehicles employed to review the sufficiency of the evidence." *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *see* generally 43A George E. Dix & John M. Schmolesky Texas Practice: Criminal Practice and Procedure Chap. 51 (3d Ed. 2011) (discussing distinction between judicial rules for

assessing sufficiency of evidence and instructions given to the jury to use in certain circumstances).[3] Texas courts are forbidden from instructing the jury on an evidentiary sufficiency rule that does not have a statutory basis. *Brown v. State*, 122 S.W3d at 799.

This court has explained that giving a jury instruction on judicial evidentiary sufficiency review rules informs the jury of the minimum amount of evidence from which they may find an element of the offense. *Id* at 800. In turn it conveys an opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it. *See id*.

The non-statutory instruction given by the trial court might have been relevant to the statutory offense, however, it is a judicial review device which was only appropriate in the assessment of sufficiency of the evidence. *See Kirsch v. State*, 357 S.W.3d at 652. In this case the trial court erred because it focused the jury's attention on the type of evidence

[3] In its opinion below, the Court of Appeals failed to recognize this distinction by its reliance upon *Brooks v. State*, 529 S.W.2d 535 (Tex. Crim. App. 1975), a case which did not pertain to jury instructions. *De La Torre*, 546 S.W.3d at 427.

that may have supported a finding of possession and thus impermissibly guided the jury's understanding of "possession." *See id* at 651-52.

Whether Appellant exercised actual care, custody, control, or management over the controlled substance was a question of fact to be resolved by the jury. *See* TEX. CODE CRIM. PROC. art. 36.13; *Brown*, 122 S.W.3d at 798-99. It was the responsibility of the advocates to argue or refute that the evidence supported that element of the offense. *See Walters v. State*, 247 S.W.3d at 214. By adding a non-statutory definition of possession, the trial court impinged on the jury's fact-finding authority by directing the jury to evidence that could constitute possession and supporting the state's theory of prosecution. *See Bartlett v. State*, 270 S.W.3d 147, 152 (Tex. Crim. App. 2008) ("Even a seemingly neutral instruction may constitute an impermissible comment on the weight of the evidence because such an instruction singles out that particular piece of evidence for special attention."). The trial court erred in giving the non-statutory instruction which commented on the evidence by unfairly emphasizing a fact in dispute.

E. If The Instruction On Joint Possession Was Proper, The Trial Court Was Obligated To Accurately Instruct The Jury On The Law, Which Would Include An Instruction On Mere Presence

The trial court *sua sponte* gave a jury instruction that expanded on the statutory definition of "possession." Even if the instruction was a correct statement of law, it was incomplete and misleading to the jury because it did not provide an instruction on "mere presence". The trial court was duty bound to provide a complete and accurate instruction. *Cf. Mendez v. State*, 545 S.W.3d 548, 553 (Tex. Crim. App. 2018) ("when a trial judge instructs on a defensive issue" on his own motion, "he must do so correctly").

The instruction provided by the court was the equivalent to an instruction on joint possession. Joint possession of drugs necessarily implicates the "affirmative links" rule. *See Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005). This rule is designed to protect an innocent bystander from conviction based solely upon his "mere presence" in the vicinity of someone else's drugs. *Id.* In such a case, additional independent facts and circumstances beyond mere presence must link the accused to the drugs. *See Tate v. State*, 500 S.W.3d 410, 413-14 (Tex. Crim. App. 2016).

If it was a correct statement of law to inform a jury on joint possession, it was likewise a correct statement of law to inform the jury that mere presence alone is insufficient. *See Golden v. State*, 851 S.W.2d 291, 294-95 (Tex. Crim. App. 1993). It is not the function of a jury charge merely to avoid misleading or confusing the jury; it is the function of the charge to lead and to prevent confusion. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1990); *Vasquez v. State*, 389 S.W.3d 361, 367 n.11 (Tex. Crim. App. 2012).

Appellant's testimony that he had no knowledge of the cocaine and was one of four individuals in the vehicle who could have discarded the baggie, was evidence supporting his argument–his mere presence did not constitute possession. Furthermore, the issue of whether Appellant was merely present was placed into question when the court instructed the jury that more than one person can possess the same controlled substance.[4] Appellant's testimony was affirmative evidence to support his defense that the cocaine was discarded in the vehicle without his

[4] The jury instruction is akin to an instruction on the law of parties which does require an additional instruction on mere presence. *See Golden v. State*, *supra*.

knowledge, and his presence in the vehicle did not establish the knowing possession of a controlled substance.

While addressing the instant jury charge issues, the Court of Appeals further observed that a trial court must tailor a jury charge to the facts presented at trial and not leave jurors free to define elements of the offense in a manner that is inconsistent with its legal meaning. *De La Torre*, 546 S.W.3d at 427. This reasoning allowed acceptance of the facts presented by the State, but disregarded the facts presented by Appellant. As a result, a jury charge was provided supporting the State's theory, but undermining Appellant's defense and denying him a fair trial. Accordingly, it was error not to include an instruction on mere presence as part of the instruction that expanded the definition of possession.

F. Appellant Was Harmed

While harm analysis is typically left to the court of appeals, this Court has sometimes elected to conduct its own review. *See Johnston v. State*, 145 S.W.3d 215, 224 (Tex. Crim. App. 2004); *Brown v. State*, 122 S.W.3d at 803. A defendant is entitled to be convicted upon a correct statement of the law. *Hutch v. State*, 922 S.W.2d 166, 174 (Tex. Crim. App. 1996), *overruled on other grounds by Gelinas v. State*, 398 S.W.3d

703. (Tex. Crim. App. 2013). "When the trial court fails to correctly charge the jury on the applicable law, the integrity of the verdict is called into doubt" because the charge fails to properly guide the jury in its fact-finding function. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

When a defendant does not object to the charge error his convictions are subject to reversal on appeal only if he has suffered "egregious harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Charge error is egregiously harmful when it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). That error must have been so harmful that the defendant was denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 172. "An egregious harm determination must be based on a finding of actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 776-77 (Tex. Crim. App. 2011). Neither party has the burden to show harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure

the rights of the defendant," which means no more than there must be some harm to the accused from the error. *Almanza*, 686 S.W.3d at 171.

In the instant case, no objection was made to the trial court's non-statutory instruction on joint possession. However, error was preserved when the trial court denied Appellant's request for a jury instruction on mere presence. Under either review for "egregious" harm or for "some" harm, it will be shown below that the combined effect of the erroneous jury instruction given and the omission of the requested instruction denied Appellant a fair trial and warrants reversal.

The following facts are considered in evaluating harm: (1) the entire jury charge; (2) the state of the evidence, including contested issues and the weight of probative evidence; (3) the parties' arguments at voir dire and at trial; and (4) all other relevant information in the record. *Almanza*, 686 S.W.2d at 171. The *Almanza* analysis is fact specific and is done on "case-by-case basis" *Gelinas v. State*, 398 S.W.3d at 710.

1. The Entire Jury Charge

In addition to defining the statutory term "possession", the jury charge instructed the jury that two or more persons can possess the same controlled substance. (CR 51). Appellant's request for a jury instruction

on mere presence was denied. (3RR 29-30). The charge allowed the jury to find Appellant guilty of jointly possessing the controlled substance without being instructed on the law of mere presence. The charge was erroneous and resulted in harm. This factor weighs in Appellant's favor.

2. The State Of The Evidence

It is undisputed that Appellant's defense was that the cocaine was placed in the console area by one of the other occupants of the vehicle. Testimony in support of this defense was presented by Appellant, who stated he had no knowledge of the cocaine, and was unaware that the officers recovered any cocaine after he was removed from the vehicle. (3RR 23-26). In other words, Appellant's defense was that he was not in knowing possession of the controlled substance, but was merely present. Since there was evidence supporting Appellant's defense, this factor weighs in his favor.

3. The Parties Argument

In its opening statement, the State argued that the package was within reach of the occupants of the vehicle, despite no one claiming the cocaine. (2RR 150). Without proper instruction, this allowed the jury to believe they could consider Appellant's presence alone. In its closing

argument, the State admitted the cocaine was not on Appellant's person, but the jury could consider his mere presence in proximity to the package. (3RR 45). Finally, the State suggested that the evidence showed the occupants' presence in the vehicle, including Appellant, proved they were in joint possession of the cocaine. (3RR 68). Because the State took full advantage of the instruction to support its theory of possession this factor weighs in Appellant's favor.

4. Other Relevant Information

The contested issue at trial was how the package got placed on the console and whether Appellant had any knowledge of it at the point the officer approached the vehicle. Appellant denied knowledge of the cocaine and the State failed to directly link him to it, leaving the jury to improperly consider his mere presence as evidence of guilt. The jury instruction error affected the sole contested issue of trial. By failing to instruct the jury on "mere presence" and allowing the jury to only consider his proximity to the baggie, Appellant suffered because the trial court's error vitally affected his defensive theory. Appellant was denied a fair trial; therefore, the error is not harmless. The conviction should be reversed and the case remanded for a new trial.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that the judgment of the Court of Appeals be reversed and a new trial ordered. In the alternative, Appellant respectfully prays that the judgment be reversed and the case remanded to the Court of Appeals for further proceedings.

Respectfully submitted,

/s/ Steven J. Lieberman

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CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 4,822 words. This document complies with the typeface requirements of rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/s/ Steven J. Lieberman
STEVEN J. LIEBERMAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief on Discretionary Review was served via e-mail delivery through eFile.TXCourts.gov to Jay Johannes, Colorado County Attorney's Office, and Stacey Soule, State Prosecuting Attorney on this the 15th day of November, 2018.

/s/ Steven J. Lieberman
STEVEN J. LIEBERMAN